ANG KEE SIM

v.

KEMBANG JAYA DEVELOPMENT SDN BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-457-2000 (MT 4)]
27 JUNE 2001

CONTRACT: *Specific performance - Sale and purchase agreement - Whether effective and applicable - Section 75 of the Contracts Act 1950 - Whether applicable - Application for extension of time - Whether made in time - Whether plaintiff entitled to specific performance - Section 11(3) of the Housing Developers (Control and Licensing) Regulations 1989*

CONTRACT: *Building contract - Delay in completion - Vendor unable to fulfil contract by completion date - Deduction of liquidated damages for delay - Whether allowable - Whether plaintiff entitled to specific performance*

This case deals with the plaintiff's application for an order of specific performance, together with other consequential reliefs of a sale and purchase agreement (the 'agreement') for some property; between the plaintiff as purchaser, and the defendant as vendor.

The defendant had apparently failed to complete the contract within the completion period and deliver vacant possession in respect of the property within 24 calendar months as stipulated in cl. 20(1) of the agreement. It was only after a delay of 813 days from the date of delivery that the defendant was ready to hand over vacant possession of the property and subsequently thereto; requested the plaintiff to settle all overdue final balance payments. The plaintiff, however, duly set off from the final balance payment a certain sum due to himself from the defendant as liquidated damages due for the delay of 813 days. The plaintiff then demanded from the defendant the balance sum after the set off from the final balance payment; which the defendant refused. Hence, this suit.

The sole argument forwarded by the defendant was that the plaintiff must honour the agreement by making the full balance payment first. This is because the defendant had applied (the 'application') to the Ministry of Housing for an extension of time.

Held:

[1] By a separate letter to the plaintiff, the defendant had admitted that the plaintiff was entitled to the claim for liquidated damages as stated in cl. 20 of the agreement. Since there was no argument as to the propriety or otherwise of the said clause and the applicability of s. 75 of the Contracts Act 1950, hence, it is conceded that cl. 20 is effective and applicable.

[2] The defendant's sole argument was doomed from inception. The proviso of sub-s. (3) to s. 11 of the Housing Developers (Control and Licensing) Regulations 1989 states clearly that such an application for extension of time will not be approved unless it is made before the expiry of the 24 months, as stipulated in the agreement. Here, the application was made at least three years and two months after the stipulated completion date in the agreement. Hence, the defendant is caught by the proviso. Since the application was made out of time, there is no room for the court to exercise any discretion. Clearly, the plaintiff is entitled to the damages.

[Order accordingly.]

Legislation referred to:
Contracts Act 1950, s. 75
Housing Developers (Control and Licensing) Regulations 1989, reg. 11(3)
Rules of the High Court 1980, O. 81

For the plaintiff - TK Lau; M/s Goh Eng Kee & Co
For the respondent - John Khoo; M/s Ismail Khoo & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

RK Nathan J:

The Claim

This is the plaintiff's application under O. 81 of the Rules of the High Court 1980 (the RHC) for an order for specific performance of a sale and purchase agreement dated 17 May 1996 entered into between the plaintiff as the purchaser and the defendant as the vendor (the agreement). There were other consequential prayers sought.

Facts

The defendant is a developer licenced under the Housing Developers (Control and Licensing) Act 1966. The said agreement was in respect of Plot No. 77 (Lot No. 10384) H.S.(M) 1259 of approximately 753 square feet together with

a 2-storey terrace house to be erected thereon (the said property). The total purchase price was RM145,000. The purchaser then charged the said property to Perwira Affin Bank (the chargee) and obtained a housing loan of RM130,000. Clause 20(1) of the said agreement dealt with the completion period in respect of the said property. It reads as follows:

> 20. Time for delivery of vacant possession
>
> (1) The said Building shall be completed by the Vendor and vacant possession, with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty-four (24) calender months from the date of this Agreement.
>
> (2) If the Vendor fails to hand over vacant possession of the said Building, together with the connection of water and electricity supply to the said Building, in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

Clause 7 stipulates that time was of the essence of the contract. The defendant failed to complete the contract and deliver vacant possession within the stipulated 24 calender months, that is, by 16 May 1998. However by a letter dated 25 July 2000 the defendant informed the plaintiff that as of that date he was ready to hand over vacant possession of the said property to the plaintiff. In the said letter the defendant also requested the plaintiff to settle all overdue balances. The actual date of handing over of vacant possession was 8 August 2000. There is no dispute between the parties that the delay from date of delivery was 813 days. The plaintiff calculated the liquidated damages due for the 813 days as amounting to RM32,297.26. It is also not in dispute that there was due to the defendant a final progress payment of RM29,000.

By a notice of demand dated 10 August 2000 the plaintiff set off from the sum of RM32,297.26 due to him from the defendant, the final progress payment of RM29,000 due from him to the defendant and demanded the balance of RM3,297.26. The defendant refused and hence the suit.

Findings Of The Court

By a separate letter dated 25 July 2000 the defendant admitted that the plaintiff was entitled to the claim for liquidated damages as stated in cl. 20 of the said agreement. Since no submission was even made as to the propriety or otherwise of such a clause and the applicability of s. 75 of the Contracts Act 1950, I shall proceed on the basis that the defendant has conceded that cl. 20 is effective and is applicable. The only argument raised by Mr. John Khoo for the defendant was that before the defendant could seek a prayer for specific

performance and the consequential orders, the plaintiff himself must honour the agreement by making full payment first. This is because the developer had applied to the Ministry of Housing for an extension of time. Counsel referred me to a letter from the defendant to the controller, Ministry of Housing and Local Government dated 22 July 2000 seeking an extension of time to complete the payment. It is therefore important to look at the regulation that allows the developer to make such an application to the controller for extension of time. The relevant regulation is 11(3) of the Housing Developers (Control and Licensing) Regulations 1989. It reads as follows:

> 11. Contract of Sale
>
> (1) xxx
>
> (2) xxx
>
> (3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

Mr. Khoo's argument was doomed from inception. The proviso to sub-s. (3) states clearly that such an application for extension of time will not be approved unless it is made before the expiry of the 24 months stipulated in the agreement. Here the defendant made this application for extension of time on 22 July 2000 stating various reasons. Yet three days later, by the proverbial wave of the magic wand, the defendant was able to put right the long list of complaints enumerated in its letter dated 22 July 2000 being the reasons why it was seeking the extension of time. Obviously that application was made as an after-thought to prop up its case to defeat this legitimate claim of the plaintiff. In any case, the defendant is caught by the proviso. As the application was made at least three years and two months after the completion date, the application was a non-starter. No wonder even the controller had not replied to the defendant's letter. In any case since the application was made out of time there is no room even for the court to exercise any descretion. I do not, even at this point, have to consider that there is no certificate in writing from the controller giving the defendant the extension of time sought. Clearly the plaintiff is entitled to the damages.

I therefore gave the following orders:

1) A declaration that the defendant is indebted to the plaintiff in the sum of RM32,297.26 being damages arrived between 17 May 1996 to 8 August 2000.

2) that the plaintiff is entitled to set off from the sum of RM32,297.26 the sum of RM29,000 due and owing from the plaintiff to the defendant as final progress report.

3) that the defendant do pay the plaintiff the sum of RM3,297.26.

4) that the defendant do hand over to the plaintiff all the keys to the vacant property unconditionally within seven days of this order.

5) that the defendant do pay interest on the sum of RM3,297.26 at 4% p.a. from 25 August 2000 to date of judgment.

6) no damages awarded.

7) Costs.